

To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JULITA ALDAN SABLAN,

Defendant.

No. CR09-00026

**MEMORANDUM OPINION AND
ORDER REGARDING
DEFENDANT’S MOTION TO
SUPPRESS**

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I. INTRODUCTION AND BACKGROUND

A. Procedural Background

In a Second Superseding Indictment (docket no. 81), handed down February 25, 2010, defendants Roque S. Norita and Julita A. Sablan were charged with offenses involving methamphetamine hydrochloride and d-methamphetamine hydrochloride (“ice”),

and defendant Norita was charged with using a firearm during and in relation to a drug-trafficking crime. More specifically, the charges in the Second Superseding Indictment are the following:

Count 1 charges that, from a date unknown, but on or about August of 2008, and continuing through about July 28, 2009, defendants Norita and Sablan conspired, with each other and with others known and unknown to the Grand Jury, to distribute methamphetamine and to possess methamphetamine, that is, methamphetamine hydrochloride and d-methamphetamine hydrochloride (“ice”), with intent to distribute it, all in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(C), and 18 U.S.C. § 2;

Count 2 charges that, on or about February 19, 2009, defendants Norita and Sablan knowingly and intentionally possessed 0.050 net grams of methamphetamine hydrochloride, with intent to distribute it, and, at the time, defendant Norita was within 1,000 feet of a school, namely the Gregorio T. Camacho Elementary School in San Roque Village, all in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), 860(a) and (b), 18 U.S.C. § 2, and *Pinkerton v. United States*, 328 U.S. 640 (1946);

Count 3 charges that, on or about February 19, 2009, defendants Norita and Sablan knowingly and intentionally possessed 0.062 net grams of methamphetamine hydrochloride, with intent to distribute it, and, at the time, defendant Norita was on premises on which an individual under the age of 18 years resided, all in violation of 21 U.S.C. §§ 860a, 18 U.S.C. § 2, and *Pinkerton v. United States*, 328 U.S. 640 (1946);

Count 4 charges that, on or about February 25, 2009, defendant Sablan knowingly and intentionally possessed 1.1 actual grams of d-methamphetamine hydrochloride (“ice”), with intent to distribute it, and, at the time, defendant Sablan was within 1,000 feet of a school, namely Tanapag Elementary School, and was also on premises on which an individual under the age of 18 resided, all in violation of 21 U.S.C. §§ 860(a) and (b),

860a, and 841 (b)(1)(C);

Count 5 charges that, on or about July 27, 2009, defendant Sablan knowingly and intentionally possessed 0.11 actual grams of d-methamphetamine hydrochloride (“ice”), with intent to distribute it, and, at the time, defendant Sablan was at Candi Poker in Tanapag Village, within 1,000 feet of a school, namely Tanapag Elementary School, all in violation of 21 U.S.C. §§ 860(a) and (b), and 841 (b)(1)(C);

Count 6 charges that, on or about July 28, 2009, defendant Sablan knowingly and intentionally possessed 0.070 net grams of methamphetamine hydrochloride, with intent to distribute it, at Banana Beach in Tanapag Village, all in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C);

and **Count 7** charges that, on or about March or April of 2009, defendant Norita, during and in relation to a drug-trafficking crime, knowingly used a firearm, namely a .223 caliber Armalite Model M15A2 rifle, serial number US48714, by trading it for methamphetamine, all in violation of 18 U.S.C. § 924(c)(1)(A).

These charges against Norita and Sablan are set for a jury trial before the undersigned, as a visiting judge, beginning on April 12, 2010.

On March 11, 2010, defendant Sablan filed a Motion to Suppress. In her motion, defendant Sablan challenges a search warrant that was issued for a search of her residence in Tanapag Village, Saipan, on February 25, 2009, pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), and seeks to suppress evidence found during the execution of that search warrant. She argues the application for the search warrant contained materially false statements of fact, and that without those falsehoods, there was no probable cause to support the search warrant. On March 25, 2010, the prosecution filed its response to defendant Sablan’s motion. The prosecution contends that defendant Sablan has failed to make even a *prima facie* showing necessary for her to be entitled to a *Franks* hearing. The

prosecution specifically argues that there were no materially false statements in the search warrant affidavit, that defendant Sablan has not alleged that statements in the search warrant affidavit were deliberately and recklessly made, and that Sablan has not alleged that the challenged statements were necessary to a finding of probable cause. The prosecution, alternatively, argues that even if the court concludes that there was a Fourth Amendment violation, the conduct of the law enforcement officers in this case does not rise to the level justifying the exclusion of evidence.

The court held an evidentiary hearing, via video teleconference, on the motion on March 29, 2010, at which Assistant United States Attorney James J. Benedetto represented the prosecution, and defendant Sablan was present in person with her attorney, G. Anthony Long. Defendant Roque Norita was also present with his counsel, Bruce Berline. The prosecution offered the testimony of Detective Peter R. Camacho, an officer for the Northern Mariana Islands Department of Public Safety. The court admitted into evidence Government Exhibit 1, a surveillance report, Government Exhibit 2, transcript, Government Exhibit 4, affidavit, Government Exhibit 5, report, Government Exhibit 11, search warrant, Defendant Exhibit A, transcript, and Defendant Exhibit B, report of investigation.

B. Factual Background

The following factual background, taken from the hearing testimony and exhibits, sets out the information known to law enforcement officers at the time they applied for the search warrant for Sablan's residence.

On February 24, 2009, officers in the Commonwealth of the Northern Mariana Islands ("CNMI") Department of Public Safety Narcotics Unit and Criminal Investigations units conducted a buy-walk operation using a confidential source, Jose Castro (Castro").

After meeting Castro at a pre-arranged location, Detective Steve Castro searched Jose Castro's body for any large amount of money or contraband. After finding nothing during the search, Detective Peter Camacho handed Castro \$40 in pre-recorded funds to purchase crystal methamphetamine ("Ice") from Julita Sablan. Detective Camacho also gave Castro a recording device/radio transmitter to record his meeting with Sablan. The device also allowed the surveillance units to overhear Castro's conversations. Castro then drove to Sablan's residence in Tanapag in an unmarked police car. He was followed by surveillance units. From their positions, the surveillance units could observe Castro's interaction with individuals at Sablan's residence. Although the surveillance units could also overhear, through the radio transmitter given to Castro, his conversations with individuals at Sablan's residence, the quality of the transmission was, at times, severely inhibited by a poor transmission, wind interference, and background sounds.

Almost all of the conversations that took place at Saban's residence this evening, and which were recorded by the hidden recording device hidden on Castro, were in Chamorro.¹ Detective Camacho is fluent in both English and Chamorro. When Castro first arrived at Sablan's residence, Detective Camacho could hear Castro speaking with an unknown male individual. He then overheard Castro speaking with defendant Sablan. Detective Camacho was unable to overhear much more of Castro's conversations because of a weak radio transmission. At times, Detective Camacho could hear Castro talking, but only intermittently and not clearly.

After approximately one-half hour, Castro left Sablan's residence and met up with the surveillance units at the pre-arranged location. One of the officers retrieved a small,

¹Chamarro is an Austronesian language spoken on the Mariana Islands. See www.britannica.com/EBchecked/topic/105097/Chamarro-language

zip lock bag containing a crystalline substance from Castro. Subsequent testing of the substance revealed that it was Ice. Detective Camacho retrieved the recording device/transmitter from Castro. Detective Steve Castro then searched Jose Castro's person for money or contraband, and found none. Castro was then debriefed by Sergeant J. Agulto. Detective Camacho was also present at the time of Castro's debriefing.

Following Castro's oral debriefing, a written statement of his debriefing was prepared for Castro's signature. The written statement was signed by Castro, as well as Sergeant Agulto and Detective Camacho.² Castro's written statement reads, in pertinent part, as follows:

In the morning hours of February 24, 2009, I met with Sgt. Agulto and Det. Peter Camacho in Capitol Hill. I told both Officers that I could purchase ICE from Julita Sablan. Both Officers informed me that they would be picking me up later. On the same date in the early evening hours both officers came to my house and brought me to Navy Hill area.

At the area I was told as what to do. I was searched for drugs and cash and nothing was found. A device was placed on my person. I was given forty dollars and I drove to the residence of Julita located in Tanapag. When I got to Julita's house her brother Ben approached my car. I was talking to Ben when Julita approached my car. Julita invited me down. I exited the vehicle and sat under a mango tree. I told Julita that I wanted to buy [blacked out] worth of ICE. While we were talking Julita told me that I could check with her anytime if I needed ICE. Julita told me to go and wait in the car. I went back inside the car and waited. A short while later a young male came to the car and gave me the ICE. The young male told me Julita told him for me to check the ICE if I was satisfied.

²Detective Camacho testified that the copy of Castro's written statement introduced into evidence at the *Franks* hearing, Government Exhibit 9, had the signatures "whited out" in order to protect Castro's identity.

I told the young male I was satisfied and gave him the forty dollars. I left Julita's house and headed back to the same place where I met with the police officers. When I got there I handed Det. Camacho the Ice I bought from Julita. My self and the vehicle I was driving were searched for drugs and cash and nothing was found. Later Sgt. Agulto dropped me home.

Confidential Source Statement at 1, Government Ex. 9.

That evening, Detective Camacho also transferred the tape recording of the night's events onto a compact disc. In doing so, Detective Camacho listened to the recording while it was being transferred.³ Detective Camacho, however, was not paying close attention to the recording for it is his practice to not include material from undercover recordings in his search warrant applications. In the recording, Sablan states, "I'm not selling" or "I'm not selling that!", depending on which party's translation of the recording is considered. Moreover, neither translation of the recording reveals any statement by Sablan to Castro in which she tells him that he can check with her anytime he needs Ice. The next morning, on February 25, 2009, Detective Camacho applied for a search warrant for Sablan's residence. In his affidavit in support of the warrant application, Detective Camacho averred as follows:

Affiant is a Police Officer for the Commonwealth of the Northern Mariana Islands Department of Public Safety, currently assigned to the Criminal Investigation Division, Narcotics Activity Resolution Coalition (NARC). Affiant is specifically detailed to investigate violations of the Commonwealth of the Northern Mariana Islands (CNMI) Controlled Substance Act and Weapons Violation Act. Affiant has been employed at the Department of Public Safety for over five [sic] (8) years, and in which time, Affiant has been

³ Detective Camacho's testified consistently that he listened to the recording before executing his affidavit, notwithstanding the prosecution's repeated attempts to have him alter his testimony on this point.

involved in numerous investigations involving Controlled Substance Act and Weapons Violation Act and other criminal activities in the CNMI. Affiant has also received trainings from the 14th CNMI Police Academy, CNMI Criminal Investigation Divisions, U.S. Department of Justice Federal Bureau of Investigations (F.B.I.) and numerous other in-house training. This affidavit is submitted solely in Affiant's official capacity as a Drug Enforcement Task Force.

1. Within the past 16 hours, members of the Department of Public Safety (DPS) Local Narcotics Units conducted a controlled and monitored purchase of Crystal Methamphetamine commonly known as ICE using a DPS Cooperating Source (CS) and using official [sic] Authorized Funds (OAF) to purchase ICE from Julita Aldan SABLAN (hereinafter referred to as SABLAN) at her residence in Tanapag, Saipan, CNMI. The substance (ICE) bought from SABLAN was later field-tested using the Narcotics Identification Kit (NIK) and the results came out presumptive positive for Methamphetamine or ICE.
2. During this meeting, SABLAN told the CS that if the CS wanted to purchase more ICE the CS can meet SABLAN at her residence in Tanapag, Saipan, CNMI.
3. Further Investigation reveals from your Affiant that SABLAN has been convicted in the past for drug related offenses.

Camacho Aff. at 1, Defendant's Ex. D. Detective Camacho's lack of details in his search warrant affidavit reflects his policy "to just summarize everything." In preparing his affidavit, Detective Camacho relied exclusively on his own observations as well as Castro's oral and written debriefing statements. Based on Detective Camacho's affidavit,

a search warrant was issued for Sablan's residence on February 25, 2010, at 1:30 p.m. At 3:38 p.m, law enforcement officers executed the search warrant. During the ensuing search of Sablan's residence, law enforcement officers located a small quantity of Ice.

On February 26, 2010, the confidential source, Jose Castro, was interviewed by Commonwealth of Northern Mariana Islands Customs Officer Ray Renguual and Special Agent Brian Todd. On March 1, 2010, Officer Renguual prepared a written report regarding Castro's interview. The report reads as follows:

1. On 02-26-10, SA Brian Todd and Commonwealth of Northern Mariana Islands Customs (CNMI) Officer Ray Renguual interviewed Jose Castro regarding the activities of Julita SABLAN and Roque NORITA. Castro confirmed that he previously worked as a Confidential Source for the CNMI Department of Public Safety (DPS) and that he received direction from Detective Joe Agulto. Castro stated that during this period, DPS paid him approximately thirty dollars for his services. Castro stated that he became disgruntled after statements attributed to him in a federal affidavit, and the statements were largely inaccurate.
2. According to Castro, DPS investigators attempted to utilize him (Castro) [sic] purchase forty dollars worth of methamphetamine from Julita SABLAN. Castro stated that DPS investigators provided him with the forty dollars to purchase the methamphetamine from SABLAN and then followed him as he went to SABLAN's residence in Tanapag Village. Castro stated that he arrived at the residence and met SABLAN outside. Castro said he asked for forty dollars worth of methamphetamine and SABLAN indicated that she had none on hand. Castro stated that an unidentified male juvenile at the residence became aware of the situation and provided Castro with methamphetamine in exchange for forty dollars in official funds. Castro stated that he recalls the transaction occurred at approximately 8:00 p.m. at night. Castro also stated that DPS investigators never obtained a

voluntary statement from him (Castro) regarding the events that took place at Sablan's residence.

3 Castro stated that since he was a long time resident in Saipan, he has good relations with various store owners and that they allow Castro to make purchases on credit. Castro stated that another reason that he was disgruntled with Detective Agulto was that in at least one instance, he purchased two hundred dollars of beer for Agulto on credit and Agulto never paid Castro back.

4. SA Todd informed Castro that he (SA Todd) was aware that there had been issues regarding his (Castro's) testimony in federal court during a probation revocation hearing for SABLAN. Castro acknowledged, and said this was because he was disgruntled and uncomfortable with statements attributed to him (Castro) in the pertinent affidavit. SA Todd asked if SABLAN's family pressured Castro regarding his testimony. Castro replied that he had not been pressured. Castro stated he did approach Anthony Long, counsel for SABLAN, prior to his testimony.

5. Castro then stated that he is familiar with Roque NORITA, but knows him as "Roy." Castro stated that in one instance, he went to NORITA's residence to purchase a turtle for Detective Agulto. Castro added that during this visit, NORITA indicated to Castro that he (NORITA) could supply Castro with methamphetamine, but that Castro would need to provide money to NORITA in advance. Castro said he declined the offer as he was afraid NORITA would just take the money. Castro stated that this meeting with NORITA occurred approximately four years prior.

Police Report at 1-2, Defendant's Ex. E.

II. LEGAL ANALYSIS

A. Franks' Standards

The legal question at issue in defendant Sablan's motion concerns the application of *Franks v. Delaware*, 438 U.S. 154 (1978), in which the United States Supreme Court set out a limited exception to the presumptive validity of an affidavit supporting a search warrant application. Under the *Franks* decision, if the prosecution intentionally includes material false statements in its warrant affidavits, or includes material false statements with reckless disregard for the truth, that is the legal equivalent of intentional falsehood, the reviewing court must set aside the false statements and then review the remaining portions of the warrant application to determine if what remains is sufficient to establish probable cause. *Id.* at 156; *see United States v. Martinez-Gracia*, 397 F.3d 1205, 1215 (9th Cir. 2005); *United States v. Elliott*, 322 F.3d 710, 714 (9th Cir. 2003); *United States v. Hammett*, 236 F.3d 1054, 1058 (9th Cir. 2001); *United States v. Bowman*, 215 F.3d 951, 964 n.8 (9th Cir. 2000); *United States v. Senchenko*, 133 F.3d 1153, 1158 (9th Cir. 1998); *United States v. Stanert*, 762 F.2d 775, 780 (9th Cir. 1985). In addition, the Ninth Circuit Court of Appeals has extended *Franks* so that a defendant is also "permitted to challenge a warrant affidavit valid on its face when it contains deliberate or reckless omissions of facts that tend to mislead." *Stanert*, 762 F.2d at 781; *see al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009); *United States v. Craighead*, 539 F.3d 1073, 1081 (9th Cir. 2008); *United States v. Hall*, 113 F.3d 157, 159 (9th Cir. 1997).

The Supreme Court instructed that an evidentiary hearing is not warranted unless the defendant makes the following showing:

To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits

or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing.

Franks, 438 U.S. at 171. The Ninth Circuit Court of Appeals has further instructed that there are five requirements that must be satisfied before a defendant is entitled to a hearing under *Franks*:

“(1) the defendant must allege specifically which portions of the warrant affidavit are claimed to be false; (2) the defendant must contend that the false statements or omissions were deliberately or recklessly made; (3) a detailed offer of proof, including affidavits, must accompany the allegations; (4) the veracity of only the affiant must be challenged; (5) the challenged statements must be necessary to find probable cause.”

United States v. Perdomo, 800 F.2d 916, 920 (9th Cir. 1986) (quoting *United States v. Dicesare*, 765 F.2d 890, 894-95 (9th Cir.), *amended on other grounds*, 777 F.2d 543 (9th Cir. 1985)); *accord United States v. Kiser*, 716 F.2d 1268, 1271 (9th Cir. 1983); *see United States v. Collins*, 61 F.3d 1379, 1384 (9th Cir. 1995) (“To be entitled to a *Franks* hearing, [defendant] had to make a substantial preliminary showing that the affidavit contains deliberate or reckless omissions of facts that tend to mislead, and demonstrate that the affidavit supplemented by the omissions would not be sufficient to support a finding of probable cause.”). Defendant Sablan, as the movant, bears the burden of proof and

must make a substantial showing to support these elements. *See United States v. Chavez-Martinez*, 306 F.3d 973, 979 (9th Cir. 2002); *United States v. Garcia-Cruz*, 978 F.2d 537, 540 (9th Cir. 1992).

Here, in support of her motion to suppress, defendant Sablan alleges that the affidavit in support of the search warrant application contained the following two false statements:

1. That within the past 16 hours, a DPS Cooperating Source (“CS”), pursuant to controlled and monitored purchase, bought crystal methamphetamine commonly known as ICE from Julita Sablan.
- 2 Julita Sablan told the CS that if the CS wanted to buy more ICE the CS could meet her at her residence in Tanapag, Saipan.

Defendant’s Mem. at 4. In support of these contentions, defendant Sablan points to the police report of Castro’s February 26, 2010, interview. Defendant Sablan’s submission satisfies the first, second, and fourth of the Ninth Circuit’s five-factor test. Thus, the issue narrows to the two remaining requirements, namely whether defendant Sablan has made a “detailed offer of proof” regarding the alleged false statements, and whether the “challenged statements must be necessary to find probable cause.” *Perdomo*, 800 F.2d at 920; *Dicesare*, 765 F.2d at 894-95. Both of these issues the prosecution contests. A review of the search warrant affidavit and Officer Renguual’s police report shows that they are inconsistent on their face. The affidavit states that the confidential source “purchase[d] ICE from Julita Aldan SABLÁN. . . at her residence in Tanapag, Saipan, CNMI.” Camacho Aff. at 1, Defendant’s Ex. D. The police report, on the other hand, states: “Castro said he asked for forty dollars worth of methamphetamine and SABLÁN indicated that she had none on hand. Castro stated that an unidentified male juvenile at the residence

became aware of the situation and provided Castro with methamphetamine in exchange for forty dollars in official funds.” Police Report at 1, Defendant’s Ex. E. The contrast between these sets of statements, coupled with the fact that the source of the statements in the police report, Castro, is the confidential source identified in the search warrant affidavit, supports the conclusion that the search warrant affidavit may have included false statements, either made knowingly and intentionally, or with reckless disregard for the truth.

This leaves open the question of whether defendant Sablan has demonstrated that “with the affidavit’s false material set to one side, the affidavit’s remaining content is insufficient to establish probable cause.” *Franks*, 438 U.S. at 156. The court views this to be such an extremely close question and due to the close nature of this question, the prudent course of action necessitated the holding of a *Franks* hearing on defendant Sablan’s motion.

B. Analysis of the Evidence from the Franks’ Hearing

In order for the search warrant to be invalidated under *Franks*, defendant Sablan must prove by a preponderance of the evidence that the search warrant affiant, Detective Camacho, knowingly and intentionally included false information, or did so with reckless disregard for the truth. *See Franks*, 438 U.S. at 155-56, 169, 171; *United States v. Bowman*, 215 F.3d 951, 964 n.8 (9th Cir. 2000); *United States v. Hall*, 113 F.3d 157, 159 (9th Cir. 1997); *United States v. Hernandez*, 80 F.3d 1253, 1260 (9th Cir. 1996); *United States v. Stanert*, 762 F.2d 775, 782 (9th Cir. 1985); *United States v. Miller*, 753 F.2d 1475, 1478 (9th Cir. 1985). Allegations of negligence or innocent mistake are insufficient. *See Franks*, 438 U.S. at 171; *Miller*, 753 F.2d at 1478. If defendant Sablan establishes by a preponderance of the evidence that, with the warrant affidavit’s false material set

aside, the remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. *Franks*, 438 U.S. at 156, 172; *Hall*, 113 F.3d at 159; *Stanert*, 762 F.2d at 782.

Turning to the first prong of the *Franks* test, the requirement that a defendant show intentional falsehoods or statements made with reckless disregard for the truth, the court concludes, based on the testimony of Detective Camacho, that Detective Camacho's statements in his affidavit that a confidential source had purchased ICE from Julita Sablan during a controlled buy operation and that Sablan had told the confidential source that if he wanted to buy more ICE the confidential source could meet her at her residence in Tanapag, were false and/or misleading. Nonetheless, the court cannot conclude that Detective Camacho's statements constituted deliberate falsehoods or were made with reckless disregard for the truth. One Federal Circuit Court of Appeals has defined the concept of "reckless disregard for the truth," as used in the context of a *Franks* hearing, as follows:

[T]o prove reckless disregard for the truth, the defendants had to prove that the affiant "in fact entertained serious doubts as to the truth of his allegations." Because states of mind must be proved circumstantially, a factfinder may infer reckless disregard from circumstances evincing "obvious reasons to doubt the veracity" of the allegations.

United States v. Williams, 737 F.2d 594, 602 (7th Cir. 1984) (citations omitted); *see United States v. Clapp*, 46 F.3d 795, 801 (8th Cir. 1995) (holding that the test for determining whether an affiant's false statements were made with reckless disregard for the truth is "whether, viewing all of the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported."). Here, Castro's oral and written statements indicated that after

he had asked to buy Ice from Sablan, she told him that he could check with her anytime he needed Ice and directed him to go and wait at his car. After a short wait, Castro reported that “a young male came to the car and gave me the ICE. The young male told me Julita told him for me to check the ICE if I was satisfied. I told the young male I was satisfied and gave him the forty dollars.” Confidential Source Statement at 1, Government Ex. 9. Thus, Detective Camacho’s statements in his affidavit, that the confidential source had purchased Ice from Sablan and Sablan had told the confidential source that if he wanted to buy more Ice, he could meet her at her residence, were entirely consistent with Castro’s oral and written statements made immediately following the controlled buy in which Castro had described a sale of Ice orchestrated by Sablan. Given Detective Camacho’s practice of not including material from recordings made of undercover operations in his search warrant applications, but instead relying on debriefing statements, the court cannot find that Detective Camacho entertained serious doubts regarding the truth of his allegations even though a careful review of the tape recording by him would have disclosed discrepancies between Castro’s debriefing statements and the recordings. This is because Detective Camacho listened to the tape recording only once, and did so for the purpose of transferring that recording to a compact disc and not for the purpose of including material from that recording in his affidavit. Detective Camacho’s failure to listen to the tape recording as a means of assuring the accuracy of Castro’s debriefing information is clearly evidence of a negligent or sloppy law enforcement investigation. Such negligent conduct, however, is insufficient under *Franks* to void a search warrant. *See Franks*, 438 U.S. at 171; *Miller*, 753 F.2d at 1478; *see also United States v. Palega*, 556 F.3d 709, 714 (8th Cir. 2009); *United States v. Kattaria*, 553 F.3d 1171, 1177 (8th Cir. 2009); *United States v. Tate*, 524 F.3d 449, 454 (4th Cir. 2008); *United States v. Lowe*, 516 F.3d 580, 584 (7th Cir. 2008); *United States v. Colonna*, 360 F.3d 1169, 1174

(10th Cir. 2004); *United States v. Adams*, 305 F.3d 30, 36 n.1 (1st Cir. 2002); *United States v. Elkins*, 360 F.3d 638, 649 (6th Cir. 2002). Accordingly, the court rejects defendant Sablan's argument that the evidence discovered at her residence must be suppressed because of a violation of *Franks*.

Alternatively, even were the court to assume, *arguendo*, that defendant Sablan could meet the first part of her *Franks* burden, the court would nevertheless conclude that Detective Camacho's affidavit otherwise provided probable cause for the search. In determining this issue, the court sets aside the allegation that Ice was purchased from Sablan and that Sablan told Castro that if he wanted to purchase more Ice that Castro could meet Sablan at her residence. *See Franks*, 438 U.S. at 156, 172; *Hall*, 113 F.3d at 159; *Stanert*, 762 F.2d at 782. Even so, Detective Camacho's affidavit showed probable cause to search Sablan's residence. All that is required for probable cause is a "fair probability" under the "totality of the circumstances," including "fair inferences," that evidence or fruits of a crime will be found at the place searched. *United States v. Gourde*, 440 F.3d 1065, 1070 (9th Cir. 2006) (*en banc*) (quoting *Illinois v. Gates*, 462 U.S. 213 (1983)). In an explanation of *Gates*' "fair probability" standard, the Ninth Circuit Court of Appeals has instructed that:

"For probable cause to exist, a magistrate need not determine that the evidence sought is in fact on the premises to be searched, or that the evidence is more likely than not to be found where the search takes place. The magistrate need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit."

United States v. Fernandez, 388 F.3d 1199, 1253 (9th Cir. 2004) (quoting *United States v. Peacock*, 761 F.2d 1313, 1315 (9th Cir. 1985) (emphasis in original, citations omitted), *overruled on other grounds by Gomez v. United States*, 490 U.S. 858 (1989)).

Here, Detective Camacho's affidavit, after the exclusions detailed above, would still

contain the circumstances of a controlled and monitored purchase of Ice at Sablan's residence a mere 16 hours before, as well as the fact that Sablan has been convicted in the past for drug related offenses. As such, Detective Camacho's affidavit, although bare bones, would still be adequate to support the issuance of a search warrant for Sablan's residence. Federal courts have held that evidence is likely to be found where drug dealers live. *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986) ("In the case of drug dealers, evidence is likely to be found where the dealers live."); *United States v. Burton*, 288 F.3d 91, 103-104 (3rd Cir. 2002) (noting that courts "'have held that evidence . . . is likely to be found where the [drug] dealers reside.'") (quoting *United States v. Whitner*, 219 F.3d 289, 297-98 (3rd Cir. 2000)). As the Third Circuit Court of Appeals explained in *Whitner*,

evidence associated with drug dealing needs to be stored somewhere, and . . . a dealer will have the opportunity to conceal it in his home. After all, a dealer logically could conclude that his residence is the best, and probably the only, location to store items such as records of illicit activity, phone books, address books, large amounts of cash, assets purchased with proceeds of drug transactions, guns to protect drugs and cash, and large quantities of drugs to be sold.

Whitner, 219 F.3d at 298. Thus, without the redacted statements in Detective Camacho's affidavit, a judge could still reasonably infer from the recent drug transaction at Sablan's residence when considered in combination with Sablan's history of drug related offenses, that a fair probability existed that evidence or fruits of criminal activity would be found at Sablan's residence. Accordingly, the court concludes that defendant Sablan's Motion to Suppress evidence should be denied. In view of this conclusion, the court need not address the prosecution's argument that the exclusionary rule does not require suppression of the evidence in this case.

I have upheld the search in this case - albeit with a significant degree of

constitutional reluctance. While I am a visiting judge to the District of the Northern Mariana Islands and not experienced nor wise in the culture, procedures, and routines of law enforcement on Saipan, my displeasure with the quality of the search warrant application in this case is towering. The search warrant application is one of the shoddiest applications, if not the shoddiest, to ever pass Fourth Amendment muster by me during my sixteen years as a United States District Court Judge.

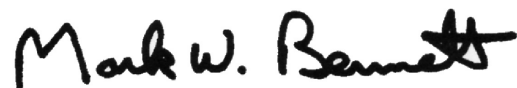
The prosecution would be wise to jettison this search and the counts it relates to - lest the entire case need be retried. If defendant Sablan is convicted of the other counts, I doubt the counts involved in this suppression motion would add anything to her ultimate sentence. While the prosecution is no doubt tempted to proceed fully against defendant Sablan on all counts, the United States Attorney's Office would be well served to recall the quote from Oscar Wilde; "I can resist everything except temptation."

III. CONCLUSION

Therefore, for the reasons set out above, the court **denies** defendant Sablan's Motion To Suppress.

IT IS SO ORDERED.

DATED this 31st day of March, 2010.



MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA
VISITING JUDGE